90-1946 (1)

Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF MICHIGAN

PETITIONER

V

SABRINA WILCOX

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE BAR RETRYING A DEFENDANT WHO CHOOSES NOT TO ASSERT HIS RIGHT AGAINST DOUBLE JEOPARDY PRIOR TO AN UNSOLICITED MID-TRIAL DISMISSAL ON GROUNDS UNRELATED TO GUILT OR INNOCENCE?

IF SO, DOES THIS COURT'S HOLDING IN UNITED STATES V DINITZ, 424 US 600 (1976) MEAN THAT DOUBLE JEOPARDY PRINCIPLES BAR RETRYING A DEFENDANT WHO AGREES TO A MID-TRIAL DISMISSAL ON GROUNDS UNRELATED TO GUILT OR INNOCENCE "SUBJECT TO ANY RIGHTS...AGAINST REINSTATEMENT OF CHARGES WHICH RESULT IN DOUBLE JEOPARDY"?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF MICHIGAN,

Petitioner,

vs.

SABRINA WILCOX,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF MICHIGAN

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting

Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, entered in this cause on May 7, 1990, one judge dissenting, leave to appeal denied by the Michigan Supreme Court on May 13, 1991, one justice dissenting.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 183 Mich App 616; 456 NW2d 421 (1990), and appended below as Appendix A; the order of the Michigan Supreme Court granting leave to appeal is reported at 436 Mich 879 (1990), and appended below as Appendix B; the order of the Michigan Supreme Court vacating its order granting leave, and denying leave to appeal is unreported as yet, and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals entered judgment on May 7, 1990. The Michigan Supreme Court entered judgment on May 13, 1991. This Court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be subject for the same offence to be twice put in jeopardy of life of limb... nor be deprived of life, liberty or property without due process of law...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Following bindover on charges of possession of marijuana with intent to deliver, jury trial in this matter commenced on November 30, 1988 in Detroit Recorder's Court, before the Hon. Henry Heading. Testimony at trial showed the following:

On June 7, 1988, at about 11:00 p.m., Detroit police officers executed a search warrant at 4438 Lakepointe in the City of Detroit. The basis for the warrant was a controlled purchase of cocaine at that address by an undercover informant from a person named "Tim," and the divergence between the warrant and the charge formed the basis for a defense dismissal motion during the course of trial. Following notice of their purpose and presence, the officers forced entry through a steel grate, and observed Respondent in the dining room; on the dining room table was a red tin can containing several baggies of marijuana,

along with $203 in United States currency. Officer Ralph Unger testified that after advising Respondent of her constitutional rights, Respondent admitted having eight bags of marijuana in her house, but denied selling any of it, and claimed that it was all for her personal use.

Officer Keith Terry testified that prior to executing the search warrant, he had tried to make a purchase at the house, in order to "make sure that they had some drugs there," and to prevent a raid if it would only be a "dry run." He approached the house, where Respondent seemed to be expecting him, and asked to purchase some marijuana. Respondent asked him whether he knew her, to which he replied that he had been there before -- but that the last few times, "Tim" had given him his "stuff." She responded that if he wanted to purchase anything on that day, he would have to wait until "Tim" returned. At the time, she was holding a red cookie tin in her hand;

following the raid, he observed the cookie tin to contain "money and marijuana." On cross examination, he testified that he had recognized her from a previous purchase, about a year earlier, and on redirect, he explained that he thought it would be easier to purchase marijuana from her, because that was what he had bought the time before.

On questioning by the trial judge,* Officer Terry admitted that he was near the premises on the date of the informant's controlled buy, but that he did not proceed to enter the home and arrest the seller immediately because he did not have a search warrant. The trial prosecutor also made an offer of proof, to the effect that Terry and the informant were alone at the time, and was arguing against dismissal when the judge invited him to cease arguing unless he wished to waste the court's time any further, and directed him to "sit down and

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* For the sake of brevity, and to give the Court the proper flavor of the proceedings, Petitioner has appended the Officer's testimony as Appendix D.

let [the court] do what [the court is] going to do." The trial judge then dismissed the case, holding that Officer Terry should have immediately entered the dwelling and arrested the seller at the time of the first undercover purchase, without troubling to obtain a warrant.

Prior to discharging the jury, the trial judge and defense counsel had the following exchange, concerning the Double Jeopardy implications of the dismissal:

> [DEFENSE COUNSEL]: Before the jury comes out I have a question as well. Where is that going to put the defendant's position if they [the Appellate courts] answer that question? I think as far as whether or not the search warrant -- I guess one of the questions was whether or not -- was whether or not the sufficiency of the police operation violated the defendants' right to search and seizure [sic].
>
> THE COURT: Well, you can bring all that up.
>
> [DEFENSE COUNSEL]: Okay. Well, but we're talking jeopardy because --
>
> THE COURT: No, this wouldn't be jeopardy. The prosecutor has the right now to appeal. And thank God he has. At one time he wouldn't

> have the right to appeal. But, he does have the right to appeal now and reinstate that case if I'm wrong.
>
> [DEFENSE COUNSEL]: About the question of whether or not --
>
> THE COURT: The officer had a right to go in that house.
>
> [DEFENSE COUNSEL]: I'm in agreement, of course, with the Court's dismissing this case, but from the viewpoint of the rights of this defendant how -- what kind of bearing is that?
>
> THE COURT: Well, see, I can't say what right the Court of Appeals is going to have. I don't know. What I want resolved is a question of law, a very important question of law.

Following the dismissal, Petitioner appealed to the Michigan Court of Appeals, claiming that the trial judge erred in dismissing the prosecution on grounds unrelated to the case before it, that the existence of a valid search warrant was not grounds for the suppression of evidence, and that retrial was permissible under this Court's holding in United States v Scott, 437 US 82 (1978). The Court of Appeals agreed that the trial court erred in dismissing the case on grounds bearing no

relevance to Respondent's guilt or innocence, nor with any issue relevant to the prosecution. However, the majority concluded that Respondent's qualified consent to the dismissal did not operate to avoid the application of Double Jeopardy principles under United States v Dinitz, 424 US 600 (1976), and remanded the cause for entry of a dismissal with prejudice. The dissenting judge would have remanded for retrial, holding that Respondent's consent to the dismissal precluded the application of the Double Jeopardy bar under this Court's holdings in United States v Scott, supra and United States v Dinitz, supra.

On October 24, 1990, the Michigan Supreme Court granted Petitioner's application for leave to appeal. On May 13, 1991, following briefing and argument, and over the dissent of one justice, the Michigan Supreme Court vacated its order and denied leave to appeal "because the Court is no longer persuaded that the questions presented should be reviewed by this Court."

REASONS FOR GRANTING THE WRIT

> "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."
>
> Justice Holmes, dissenting in Kepner v United States, 195 US 100, 134; 24 S Ct 797; 49 L Ed 114 (1904).

In Downum v United States, 372 US 734; 83 S Ct 1033; 10 L Ed 2d 100 (1963), this Court overturned nearly a century of jurisprudence affirming the discretion of trial judges to terminate trials in the interests of justice, in favor of a construction of the Double Jeopardy provisions of the Fifth Amendment strictly limiting the power of judges to terminate ongoing trials. Since then, the Court has issued numerous opinions in the area of Double Jeopardy. These cases range from those purporting to explain the Double

Jeopardy Clause,[1] to those explaining the decisions construing the Double Jeopardy Clause,[2] to those clarifying the opinions explaining the decisions construing the Double Jeopardy Clause,[3] until they have stripped the Clause itself of much of its original meaning. The net effect is that this Court has transformed the notion of "double jeopardy" from the relatively simple

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1 Eg, Downum v United States, supra; Benton v Maryland, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969); United States v Jorn, 400 US 470; 91 S Ct 547; 27 L Ed 2d 543 (1971); Illinois v Somerville, 410 US 458; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

2 Eg, United States v Wilson, 420 US 332; 95 S Ct 1013; 43 L Ed 2d 232 (1975); Serfass v United States, 420 US 377; 95 S Ct 1055; 43 L Ed 2d 265 (1975); United States v Jenkins, 420 US 358; 95 S Ct 1006; 43 L Ed 2d 250 (1975); United States v Dinitz, 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976).

3 Eg, United States v Martin Linen Supply Co, 430 US 564; 97 S Ct 1349; 51 L Ed 2d 642 (1977); Lee v United States, 432 US 23; 97 S Ct 2141; 53 L Ed 2d 80 (1977); Crist v Bretz, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978); Burks v United States, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978); United States v Scott, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978).

concerns of Blackstone and the Founders,[4] into a gothic complex of rules,[5] exceptions,[6] and contending values.[7]

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4 See IV Commentaries, 329-331.

At the time of the American Revolution, the notion of what we now know as "double jeopardy" stemmed from the pleas of autrefois acquit and autrefois convict -- both of which required an actual judgment to invoke.

See also, Sigler, Double Jeopardy: The Development of a Legal and Social Policy (1969) for a good treatment of the doctrine's early days, and eventual incorporation into the United States Constitution.

5 Eg, Serfass v United States, supra (Pretrial dismissal presents no double jeopardy bar); Crist v Bretz, supra (Jeopardy attaches when jury is sworn); United States v Scott, supra (Midtrial termination on grounds unrelated to guilt or innocence no bar to retrial); United States v Dinitz, supra (Mistrial granted at defense request no bar to retrial).

6 Eg, Illinois v Somerville, supra; Lee v United States, supra, (Aborting trial that one of the parties could nullify at will due to jurisdictional defect presents no double jeopardy bar to retrial); United States v Martin Linen Supply Co, supra (Erroneous legal ruling after onset of jeopardy leading to factual resolution favorable to defense bars retrial); Sanabria v United States, 437 US 54; 98 S Ct 2170; 57 L Ed 2d 43 (1978) (Entry of "judgment of acquittal" stemming from erroneous exclusion of evidence, due to ensuing variance between indictment and proofs, bars further proceedings).

By any standard, the law pertaining to Double Jeopardy in the context of mistrials

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7 As originally formulated, the plea of double jeopardy was the procedural tool a defendant could invoke to protect himself against suffering two judgments for the same crime. Cf, United States v Herbert, 5 Cranc, CC 87 (Formal judgment of acquittal or conviction needed before plea matured into bar to further proceedings). This was consistent with the then-extant practice of investing trial judges with wide discretion to declare mistrials when necessary in the interests of justice, and when the "type of oppressive practices at which the double-jeopardy protection is aimed." Wade v Hunter, 336 US 684, 689; 69 S Ct 834; 93 L Ed 974 (1949) (Unavoidable exigencies of battle causing interruption of defendant's court martial for raping helpless civilians, defeating Nazi Germany was held not to be the sort of "oppressive practice" warranting double jeopardy bar to retrial). See also, Gori v United States, 367 US 364; 81 S Ct 1523; 6 L Ed 2d 901 (1961).

Stemming from the 1960's, the underlying premise for the modern rule appears to be that Double Jeopardy Clause serves as a bulwark against "unlimited, uncertain, and arbitrary judicial discretion," Downum v United States, supra at 738, as well as "judicial overreaching" and "bad-faith conduct by [the] judge." United States v Jorn, supra at 485.

The fact that the earlier cases recognize that trial judges must often cope with the unforeseeable, all the while responsible for ensuring the fairness of the trial, suggests that the older conception of Double Jeopardy may warrant renewed study in the future. And the critical observer may have cause to wonder how one set of judges came to question the motives and professionalism of the rest.

is in a state of confusion, lacking both direction and cohesion. And the fact that this Court's confusion is causing chaos throughout the criminal justice system is well-demonstrated by this case: a defendant, by the simple expedient of failing to assert her rights in a timely manner, is about to escape responsibility for her crimes through the combination of a bizarre ruling by a judicial officer, and the perception that Double Jeopardy rights, unlike other rights, are best asserted well after the damage is done, in order to exploit the Double Jeopardy Clause to maximum advantage. In this manner, if exercised properly, existing principles of double jeopardy provide the discerning criminal with a double benefit: the defendant benefits once from the dismissal, which spares him the distress and anxiety of waiting for an actual verdict, and again from the ensuing inability of the State to put him to trial, simply by declining to insist, prior to the jury's discharge, that the trial proceed to verdict with the

original factfinder. Such is the construction most lower courts across the country place upon this Court's "primary control" language in United States v Dinitz, 424 US 600, 607-609; 96 S Ct 1075; 47 L Ed 2d 267 (1976),[8] which in turn converts an

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[8] See, eg, State v Mercer, 500 NE2d 1278 (Ind App, 1986)(Defendant's failure to object to improper jury discharge did not waive double jeopardy claim, as State had identical right to raise objection); Spaziano v State, 429 So 2d 1344 (Fla App, 1983)(Defendant's silence or failure to object to jury discharge is not consent, and does not operate to waive double jeopardy claim); see also, State v Simpson, 371 So 2d 733 (La, 1979); State v Picchini, 463 Sp 2d 714 (La App, 1985); State v Lachat, 317 NC 73; 343 SE2d 872 (1986); Jourdan v State, 275 Md 495; 341 388 (1975); People v Harvey, 121 Mich App 681; 329 NW2d 456 (1982); Allen v State, 656 SW2d 592 (Tex App, 1983); State v Ambrose, 598 P2d 354 (Utah, 1979); State v Holt, 592 SW2d 759 (Mo, 1980).

This view is not universally shared, however. See People v Miller, 87 Cal App 3d 302; 151 Cal Rptr 71 (1978)(Defendant's pretrial argument for dismissal implies consent to dismissal granted after jury is impaneled); Adkins v Smith, 205 So 2d 530 (1967)(Defense counsel declined to comment on motion after suggesting that the prosecutor "might move for a mistrial"); Anderson v United States, 481 A2d 1299 (DC App, 1984)(No double jeopardy bar where defense fails to object, and thanks judge for declaring mistrial); People v Lovinger, 130 Ill App 3d 105; 85 Ill Dec 381; 473 NE2d 980 (1985) cert den 474 US 919; 106 S Ct 248; 88 L Ed 2d 256 (1985)(Incumbent upon

ancient and honored constitutional protection into an elaborate game, having little to do with the reason for its existence -- and even less to do with true Justice.[9]

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[8] Continued
defendant to register objection where defense makes mistrial motion, and judge later declares mistrial on similar ground after similar objection raised); see also, People v Green, 125 Ill App 3d 734; 81 Ill Dec 44; 466 NE2d 630 (1984); State v Adamson, 140 Ariz 198; 680 P2d 1259 (1984). And even among the Federal Circuits, the rule applied is far from universal: compare, eg, United States v Cyphers, 553 F2d 1064, 1067-1068 (CA 7, 1977)(Defendant's objection to proceeding to trial alone did not constitute joinder with co-defendant's mistrial motion and does not waive double jeopardy challenge to retrial after mistrial) with United States v Crosley, 634 F Supp 28 (ED Pa, 1985) affd 787 F2d 584 (CA 3, 1986)(Defendant's failure to raise timely objection to mistrial caused by deadlocked jury precludes later double jeopardy claim) and United States v Milhim, 702 F2d 522 (CA 5, 1983).

[9] Of course, the unpredictability of appellate courts, does not make the life of a trial judge or prosecutor easy: in People v Johnson, 147 Mich App 542; 382 NW2d 816 (1985), for example, the trial court faced a crisis hardly of its own making: allegations of witness tampering for the defendant's benefit having surfaced, the judge conducted an in camera hearing -- at the conclusion of which, he indicated to the defense that for the sake of the witness, he

Such a state of affairs is intolerable, and no sane legal system would stand for it. However, since the decisions of this Court appear to leave the lower courts with little choice in the matter, this Court -- and this Court alone -- is in a position to restore some needed sanity to the Law, by requiring criminal defendants to assert their Double Jeopardy rights in a timely manner if they intend to seek the protection that the

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[9] Continued
could not reveal what had transpired -- but that he would grant the defendant a mistrial upon request. Doubtless mindful of the "primary control" language of Dinitz, defense counsel promptly declined the mistrial offer -- for "tactical reasons," as he explained it on the record -- and, as if to reward such procedural gamesmanship, the Court of Appeals found that the mere refusal to move for a mistrial at the court's invitation did not waive defendant's claim of error on appeal about the factfinder's conducting in camera interviews with prosecution witnesses.

Obviously, something is wrong with a rule that so ties a trial judge's hands that he is afraid to declare an unrequested mistrial for fear of insulating a criminal from the consequences of his crime -- yet still grants the litigant the benefit of the error. And however "much maligned" such a system may be, cf, People v Moore, 432 Mich 311, 325; 439 NW2d 684 (1989), it invites "further ridicule" by its inexcusable failure to make parties responsible for their own decisions.

Double Jeopardy Clause offers.

In the past, this Court has held that other rights are not "self-executing,"and must be asserted, if at all, in a timely fashion. See, eg, Minnesota v Murphy, 465 US 429; 104 S Ct 1136; 79 L Ed 2d 409 (1984); cf, Rawlings v Kentucky, 448 US 98, 104; 100 S Ct 2556; 65 L Ed 2d 619 (1980), Rakas v Illinois, 439 US 128, 131 n 1; 99 S Ct 421; 58 L Ed 2d 387 (1978). See also, Thomas, An Elegant Theory of Double Jeopardy, 1988 Ill L Rev 827 for an interesting discussion of "election theory" within the context of double jeopardy. Applying a similar rule to the Double Jeopardy Clause would do much toward bringing needed direction and stability to Double Jeopardy law, eliminate some of the pointless procedural gamesmanship that now infects our trial courts, and go a good way toward halting the erosion of public confidence in our system of criminal justice.

For these reasons, and to examine the workings of Double Jeopardy in the light of cold reality, this Court should grant review.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and remand the matter for trial.

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Dated: May 31, 1991

JC/mlw

APPENDICES

APPENDIX "A"

COURT OF APPEALS OPINION

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SABRINA WILCOX,

Defendant-Appellee.

May 7, 1990

No. 114526

Before: Griffin, P.J., and Reilly and R.B. Burns,*JJ.

REILLY, J.

Defendant Sabrina Wilcox was charged with possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15 (7401)(2)(c). In mid-trial the trial judge dismissed the charge because he wanted this Court to render an advisory opinion on a question involving a warrantless arrest. The prosecutor now appeals as of right subject to the double

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*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

jeopardy prohibition of MCL 770.12(1); MSA 28.1109(1)[1]. We are constrained to affirm the dismissal, but for reasons other than stated by the trial court. Further, the dismissal shall be with prejudice.

The dispositive issue on appeal is whether reinstatement of the charge against defendant is barred by the constitutional prohibition against double jeopardy. US Const, Am V; Const 1963, art 1, sec. 15. A preliminary statement of the operative facts is necessary to our discussion.

On November 30, 1988, trial in the instant action commenced in a normal manner with the impaneling of a jury. Detroit Police Officer Keith Terry was the third prosecution witness. He testified that on July 1, 1988, he observed a confidential police informant make a controlled purchase of cocaine at 4438 Lakepointe in the City of Detroit. The cocaine was purchased from an

individual named "Tim." No arrests were made at that time.

On July 6, 1988, Terry secured a search warrant for the above residence. On July 7, 1988, several police officers executed the search warrant and arrested defendant who was seen holding a cookie tin which, upon examination, was found to contain eight baggies of marijuana along with $203 in United States Currency.

During a lengthy discourse initiated by the trial judge, Terry stated that he would not have been able to enter the house and arrest "Tim" immediately following the informant's purchase of cocaine because he would have needed a search warrant. Terry added that it is departmental policy to obtain a search warrant under such circumstances because 1) the informant would not be required to sign a complaint and reveal his identity, 2) additional officers could then be provided to assist as a precautionary safety measure, and 3) the officers would

be permitted to search the entire house for hidden narcotics. In response, the trial court stated that Terry should have entered the house without a warrant and arrested "Tim" immediately following the informant's purchase of cocaine. The trial judge then sua sponte dismissed the case because he wanted an advisory opinion from an appellate court on the narrow issue of whether a police officer can enter a private residence to make a warrantless arrest of an individual who has just completed a narcotics sale to an informant.

We believe the trial court erred when it dismissed the charge in an effort to obtain an advisory opinion regarding an issue which has no bearing on defendant's guilt or innocence, nor with the presentation of proofs with respect to the crime charged. A judge should not sua sponte declare a mistrial and dismiss the case without first considering viable alternative measures to cure a defect in

the proceedings, US v Jorn, 400 US 470, 483-485; 91 S Ct 547; 27 L Ed 2d 543 (1971), unless the examination of alternatives would be futile. US v Grasso, 552 F2d 46, 52 fn 2 (CA 2 1977). Moreover, this Court does not ordinarily render advisory opinions and we do not believe that this unrelated issue warrants such an opinion in this case. People v Gonzales, 349 Mich 572; 84 NW2d 753 (1957); Gracy v Grosse Pointe Farms City Clerk, 182 Mich App 193; ___ NW2d ___ (No. 121453)(1990).

However, we must still decide whether reinstatement of charges against defendant, following dismissal under these circumstances, is barred by the constitutional prohibition against double jeopardy.

The United States and Michigan Constitutions prohibit a defendant from being placed in double jeopardy. US Const, Am V; Const 1963, art 1, sec. 15. When a trial judges' sua sponte dismissal

in the original proceeding is ordered after jeopardy has attached, retrial is not prevented by the double jeopardy prohibitions in two circumstances: 1) where the defendant consents to the order of dismissal or 2) where the dismissal was required by manifest necessity. People v Little, 180 Mich App 19, 22; 446 NW2d 566 (1989).

Our review of the lower court record leads us to conclude that the qualified consent given by defense counsel does not suffice to avoid double jeopardy. After the trial court made his ruling dismissing the case, defense counsel agreed to the dismissal subject to any rights his client might have against reinstatement of charges which would result in double jeopardy. In response the trial judge stated that the record was protected for purposes of appeal. Such conditional consent when the defense counsel had not control over the course to be followed cannot be construed as a

waiver of the prohibition against double jeopardy. US v Dinitz, 424 US 600, 607-609; 96 S Ct 1075; 47 L Ed 2d 267 (1976); People v Benton, 402 Mich 47, 54; 260 NW2d 77 (1977)(opinion by Levin, J.) Accordingly, we must determine whether the doctrine of manifest necessity bars retrial.

It is difficult to precisely define what constitutes "manifest necessity." Examples include the failure of the jury to agree upon a verdict, misconduct on the part of a juror, or an incurrable defect in an indictment or the proceedings. Benton, supra 56-57. An important consideration is whether the nature of the defect perceived by the judge was such that if a guilty verdict had been rendered, the conviction would have had to have been reversed on appeal. Benton supra, 56-57, 59.

We do not believe that there was any defect in the proceedings precipitating the dismissal, let alone a defect which

would have mandated the reversal of defendant's conviction on appeal. We are unwilling to extend the doctrine of "manifest necessity" to include a situation where a trial judge seeks an advisory opinion on an issue having no bearing on the presentation of the proofs or the outcome of the case. Consequently, the reinstatement of criminal charges against defendant is barred by the constitutional prohibition against double jeopardy. The prosecutor's appeal is barred as well.

The order of dismissal is affirmed. The case is remanded for entry of an order dismissing the charges with prejudice.

/s/Maureen Pulte Reilly
/s/Robert B. Burns

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[1]Sec. 12(1) the people of this state may take an appeal of right in a criminal case, if the protection against double jeopardy under section 15 of article I of the state constitution of 1963 and amendment V of the constitution of the United States would not bar further proceedings against the defendant, from either of the following:

(a)A final judgment or final order of the circuit court or recorder's court, except a judgment or order of the circuit court or recorder's court on appeal from any other court.

(b)A final judgment or order of a court or tribunal from which appeal of right has been established by law.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

May 7, 1990

v

No. 114526

SABRINA WILCOX,

Defendant-Appellee.

Before: Griffin, P.J., and Reilly and R.B. Burns,*JJ.

GRIFFIN, P.J. (dissenting).

The prosecutor appeals a mid-trial dismissal of the charge against the defendant for possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). I would reverse and remand for trial.

I

During Officer Terry's testimony, the defendant moved to dismiss the charge on the grounds that the defendant was

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*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

arrested in violation of her rights to be free against unreasonable searches and seizures. The mid-trial defense motion to dismiss was primarily focused upon the search warrant which according to the defendant was defective because it referred to cocaine rather than marijuana. The lower court denied defendant's mid-trial motion for dismissal without any discussion other than stating "you're wrong on that issue."

One hour later, while Officer Terry was still testifying the trial judge reversed himself and granted dismissal of the case. Although defense counsel raised concerns as to double jeopardy, the mid-trial dismissal was nevertheless consented to by the defendant:

> MR. BASS [defense counsel]: I'm in agreement, of course, with the Court's dismissing this case, but from the viewpoint of the rights of this defendant how -- what kind of bearing is that? [Emphasis added.]

It is clear from the record that

when the trial judge ordered the charge dismissed that the judge was seeking an advisory opinion from this Court as to a search and seizure issue. What is not entirely clear is the lower court's basis for dismissal. During Officer Terry's testimony, the trial judge suggested that the police should have arrested "Tim" on November 30, 1988, immediately after the controlled purchase at the residence. It follows that if an immediate arrest had been made on July 1, 1988, the search warrant issued on July 6, 1988, and search of the residence on July 7, 1988, would not have been necessary.

In regard to the right of the officers to enter the residence on July 1, 1988, for the limited purpose of arresting Tim, the trial judge stated:

> THE COURT: . . .I think we all agree that you could not go in there and search, but there is a question of whether or not you could go in and arrest. And my feeling is that under these circumstances an officer should have the right to go in that home immediately and arrest a person whose selling drugs. Now that's my feeling. [Emphasis added.]

In dismissing the case, the trial court specified that he wished an advisory ruling on this issue. By implication, however, the trial judge also ruled that the officers should have entered the residence on July 1, 1988, for the limited purpose of arresting Tim and that therefore the subsequent search of the defendant on July 7, 1988, was unnecessary and unreasonable.

Although the trial judge expressed his personal view that a Fourth Amendment violation had not occurred, he nevertheless dismissed the case by citing a dismissal of an unrelated case by his fellow Recorder's Court Judge Vera Massey Jones:

> THE COURT: . . .and you've told that Judge Jones dismissed your case?
>
> THE WITNESS [Officer Terry]: That's correct.
>
> THE COURT: All right. I'm going to dismiss this one.
>
> MR. REUTHER [assistant prosecuting attorney]: Your Honor, I haven't had the opportunity to ask this officer some questions. I think that I can --

THE COURT: No, I want that question settled. I think the police should have that right.

II

The first issue raised is whether the trial court erred by dismissing the charge. I would hold that under these circumstances, the court clearly erred by granting the dismissal. The search of the premises pursuant to the search warrant was valid and the buy and subsequent "bust" of the premises were legal. See generally People v Gillam, 93 Mich App 548; 552-553; 286 NW2d 890 (1979); MCL 780.653; MSA 28.1259(3).

III

As to the trial judge's request for an advisory opinion, we should decline to render such an opinion. Our docket consists of true cases and controversies and we routinely decline invitations to render advisory opinions on issues unnecessary for the disposition of appeals. See Rozankovich v Kalamazoo

Spring Corp (On Rehearing), 44 Mich App 426; 205 NW2d 311 (1973); Johnson v City of Muskegon Heights, 330 Mich 631; 48 NW2d 194 (1951).

IV

The final issue raised is whether reinstatement and retrial of the charge would violate the defendant's constitutional rights against double jeopardy. I would hold that defendant's constitutional rights would not be violated by reinstatement and retrial.

First, I note that a mid-trial dismissal of the charge on Fourth Amendment grounds was sought and requested by the defendant. Although the basis for the dismissal relied upon by the trial judge was not argued by the defendant, the result was advocated by defense counsel.

Second, the transcript indicates that although defense counsel expressed concern as to double jeopardy, defendant nevertheless consented to the dismissal.

Under such circumstances I find no double jeopardy violation. See United States v Scott, 437 US 82, 98 S Ct 2187; 47 L Ed 2d 65 (1978); United States v Dinitz, 424 US 600, 96 S Ct 1075; 47 L Ed 2d 267 (1976); and People v Dawson, 431 Mich 234, 253; 427 NW2d 886 (1988).

Accordingly, I respectfully dissent and would reverse and remand for trial.

/s/Richard Allen Griffin

APPENDIX "B"

MICHIGAN SUPREME COURT ORDER
GRANTING LEAVE

Entered: October 24, 1990

89151

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 89151
COA: 114526
LC: 88-7808

SABRINA WILCOX,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is GRANTED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

Oct. 24, 1990 /s/ Corbin R. Davis

Clerk

Seal

APPENDIX "C"

MICHIGAN SUPREME COURT ORDER

Entered: May 13, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 89151
COA: 114526
LC: 88-7808

SABRINA WILCOX,

Defendant-Appellee.

On order of the Court, the Court having granted leave to appeal and considered the briefs and oral arguments of counsel, the order of October 24, 1990, which granted leave to appeal is VACATED and leave to appeal is DENIED because the Court is no longer persuaded that the questions presented should be reviewed by this Court.

Boyle, J., is of the opinion that the Court should decide by written opinion the questions presented in the briefs filed by the appellant and the appellee.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 13, 1991 /s/ Corbin R. Davis

Clerk

Seal

APPENDIX "D"

TRIAL TESTIMONY OF
OFFICER KEITH TERRY

DIRECT EXAMINATION

BY MR. REUTHER:

Q. Would you like to state your name, please?

A. Keith Terry, Detroit Police Officer, Narcotics Section.

Q. All right. Your occupation on July 7th, 1988?

A. Police officer.

Q. Did you execute a search warrant at 4438 Lakepointe in the City of Detroit?

A. Yes, I did.

Q. And who obtained that search warrant?

A. I did.

Q. Are you what they call the affiant?

A. Yes, I was.

Q. In other words, you made it out and swore before the judge; is that correct?

A. That's correct.

Q. Did you go to that address about 11:00 p.m. on that particular date?

A. Yes, I did.

Q. And what did you first do there, if anything?

A. I had a twenty dollar bill of pre-recorded secret service funds, which is marked money. I went there to go buy some cocaine or marihuana. When I got up on the porch --

Q. Who gave you that?

A. Sergeant McCann.

Q. The man here?

A. Yes.

Q. And you had the search warrant; right?

A. That's correct.

Q. What was the purpose of going to the address?

A. To make sure that they had some drugs there.

Q. The people -- in other words you didn't want a dry run; is that right?

A. That's correct.

Q. So, you went up to the house, the porch. What happened, if anything?

A. I met the defendant, Miss Wilcox, at the front door.

Q. Do you see the individual in the courtroom?

A. Yes. Sitting at counsel table in the yellow jacket.

MR. REUTHER: May the record reflect that the witness has identified the defendant.

BY MR. REUTHER:

Q. Had you ever seen the defendant before or was this your first contact?

A. I'd seen her before.

Q. And what happened, if anything?

A. When I met her at the door she just stared at me. And then she asked me what I wanted. I told her a bag of marihuana.

Q. Now, was the door opened or what? Did you knock or what?

A. No. She was -- like she was expecting me. Once I got up on the porch -- she saw me coming. She was right at the door. The only thing between us was the storm door.

Q. Is that a steel grate door?

A. It's a steel grate storm door. It's a combination of both.

Q. She asked you what you wanted?

A. Yes.

Q. What did you say, if anything?

A. A bag of marihuana.

Q. Then what happened, if anything?

A. She asked me if I knew her. And I told her yes.

Q. Then what happened, if anything?

A. Then she asked me some more questions. And then I told her I'd been there before. And I said the last few times Tim gave me my stuff.

Then she told me if I wanted some today Tim would be back later and I could come back then.

Q. Did she have anything in her hands?

A. Yes. She had a red cookie can, cookie tin, in her hand.

Q. All right. I'd like to show you People's Proposed Exhibit Number 3 and ask you if you can identify it?

THE COURT: That's Exhibit 3 now.

MR. REUTHER: Exhibit 3.

BY MR. REUTHER:

Q. Can you identify that?

A. Yes. This is the same cookie can that she had in her hand at the time.

Q. Was the cookie can opened or closed at the door?

A. It was closed.

Q. All right. What happened next, if anything?

A. I then left, returned to the raiding party and gave them a description of Miss Wilcox, told them what happened. And then I helped them on the raid.

Q. When you went to that door the first time was there anybody else there at the door?

A. Just me and her.

Q. And did you observe anyone else in the house?

A. No, I didn't.

Q. What were the lighting conditions at that time on that front porch?

A. The porch light was on. And there was a light on in the interior.

Q. What were the lighting conditions; could you see or not?

A. Oh, yes.

Q. All right. Did your raiding party return then to execute the search warrant?

A. Yes, they did.

Q. How much later in time?

A. Less than five minutes.

Q. All right. Can you tell the Jury what you observed, if anything?

A. Once I entered --

Q. Which one were you?

A. I was about the fifth officer in. I saw the same cookie can on the dining room table. I saw the defendant, and I think there was two people in the back room. It's like a den.

Q. All right. Did you see somebody take possession of that cookie can?

A. Yes. Officer Surma did. And I saw the contents of the cookie can, which was money and marihuana.

Q. I'd like to show you People's Exhibit Number 4 and ask if you can identify this?

A. Yes. This is the lock sealed folder that the marihuana was originally placed in. And it was filled out by Officer Surma in his own handwriting.

Q. All right. Do you want to look inside and see what was in the tin can?

A. Yes. This is the marihuana. There are eight baggies up here. And the marihuana was divided into eight baggies.

Q. All right. You saw Surma put that in a lock sealed folder from that can; right?

A. Right. Yes, I did.

MR. REUTHER: I have no further questions.

THE COURT: You may cross examine.

MR. BASS: Thank you.

CROSS EXAMINATION

BY MR. BASS:

Q. Officer Terry, do you recall what date you purchased rock cocaine at this premises?

A. I never purchased rock cocaine at the premises.

Q. You never did?

A. No.

Q. Did you ever purchase rock cocaine from a man named Tim?

A. No, I didn't.

Q. Are you aware or do you know who this person is, Tim?

A. I don't know him personally. I know of his name, physical description of him.

Q. I see. Is he someone that you connected to this particular house?

A. Yes.

Q. How so?

A. A source went there and talked with Tim and purchased some cocaine from him.

Q. So someone you know went there and talked to Tim?

A. That's correct.

Q. And as the affiant on the search warrant you indicated that some suspected cocaine was purchased, and that was the reason why you were asking for the warrant to raid this house?

A. That's correct.

Q. Now, you indicated that you went to this house on the 7th of June; is that correct?

A. I believe that's the day we executed the search warrant. Yes, that's correct.

Q. And you asked the defendant, did you, to buy some marihuana?

A. Yes.

Q. And she refused or what?

A. She didn't recognize me as to somebody that she had gave marihuana to before. But when I mentioned the name Tim she told me to come back when he was there.

Q. Did she say that she didn't recognize you from before or she didn't know you?

A. She didn't use those words, but when she was questioning me if I knew her and who I knew, then I only assumed by the words that she used, because she didn't recognize me or know me, that's why she didn't give it to me.

Q. Well, I don't know you to assume. I want you to say either you don't know or you know.

A. Well, I know she didn't give it to me because she didn't know me.

Q. The reason you feel is because she didn't know you?

A. That's correct.

Q. That's how you feel about it. Now had you, in fact, seen Miss Wilcox before?

A. Yes.

Q. You had seen here. Have you seen her at her house before?

A. Yes.

Q. Did you ever purchase marihuana from here?

A. Yes.

Q. When?

A. Maybe a year ago. I'm not for sure of the date.

Q. Yet and still at the time you went this time she referred you to Tim?

A. That's correct.

Q. Did you then check with the source who had purchased these drugs from Tim? Do you understand what I'm saying? Did you -- okay, the affidavit for the search warrant says there were drugs at the house. And that Tim is the person you say your source bought them from, your source, not you. Your source bought them from somebody named Tim; is that correct?

A. Yeah. Well, that was six days before the raid.

Q. That was six days before the raid?

A. That's correct. Five days when Tim was there.

Q. Did Tim get arrested this evening, this particular evening?

A. No, he didn't.

Q. Does Tim have a last name as far as you know?

A. I don't know his last name, but I know he has one.

Q. When you went into the house you say that the tin was visible for you to see on the table; is that correct?

A. That's correct.

Q. Had any of the officers moved the tin?

A. When I first saw it I don't know if anybody had touched it or not, or moved it, because, like I say, I was the fifth officer in. And some of them ran by and chased the people or went off to the other part of the house and searched the other part of the house. So, when I saw it no one

was around it at that particular point.

Q. And your testimony is that this was the tin that she had in her hands when she talked to you at the door?

A. Yes.

Q. So, it's sort of like follows her around?

A. If she didn't leave the house -- she laid the tin down. I'm not saying the tin followed her around.

Q. When she was at the door did she have the top off the tin at that time?

A. No, it was closed.

Q. It was the same way when you got in the house?

A. That's correct.

Q. So, you had to open it up to see what was inside?

A. Yes.

Q. Did you open it up?

A. No, I didn't. Someone else did.

Q. Do you know who?

A. Officer Surma.

Q. Isn't it true, Officer Terry, that you asked Mrs. Wilcox where Tim was when she came to the door?

A. No, I didn't.

Q. Isn't it true, Officer Terry, that she told you she didn't know Tim and that you were at the wrong house?

A. That's not true at all.

Q. As far as you know, Officer Terry, is there other drugs in this neighborhood, in this community? I mean, as far as the police are concerned? Do you watch in this neighborhood, to watch for drug deals?

A. Do we watch for drug dealers?

Q. In this particular neighborhood?

A. You're saying in her neighborhood where she lived at?

Q. That's correct.

A. Her neighborhood and others.

Q. Whatever happened to the twenty dollar bill you had at this point?

A. It was turned back over and placed back into the secret service funds to be used again.

Q. So, you didn't buy any marihuana that night?

A. No, I didn't.

Q. And from your testimony Miss Wilcox never offered to sell you any marihuana did she?

A. Yes, she did when she told me to come back later and I could get it when Tim was there. That was an offer.

Q. She told you to come back later to buy some marihuana from Tim; is that correct?

A. That's correct.

Q. That's your testimony?

A. Yes.

Q. And that's the truth?

A. Yes.

MR. BASS: I have no further questions.

MR. REUTHER: Just a couple, your Honor.

REDIRECT EXAMINATION

BY MR. REUTHER:

Q. You say that you had a source go in there?

A. That's correct.

Q. Tell the Jury what a source is.

A. That's a person that either tells us where drugs are or we have them planted on the drug house and we sent them there before an undercover officer goes so they know the layout of the operation.

Q. Okay. Is that in people's talk an informant?

A. Yes.

Q. Do you go to court on informant cases or not?

A. I don't go to court to testify for the informant, but if I can get enough information for a search warrant, and I make a buy, or we make a raid, then I go testify to what I've done or what a group of police officers had done.

Q. But you don't use the informant to go on a court case like this do you?

A. No.

Q. Because it's a danger to the informant; is that right?

A. That's correct.

Q. Then you use that information to make your own case and come to court and testify on; is that correct?

A. That's correct.

Q. Is that what you did in this case?

A. Yes.

Q. All right. Now, you said that you had an informant that made a buy some days before for cocaine; is that correct?

A. That's correct.

Q. Okay. Could you tell the Jury how you happened to approach and talk to the defendant in this case about marihuana?

A. Once she answered the door I recognized her. I knew the house because I'd been there. And I thought it would be easy for me to ask for marihuana than to ask for something new, some cocaine or something.

Q. From prior experience; is that correct?

A. That's right.

MR. REUTHER: I have no further questions.

RECROSS EXAMINATION

BY MR. BASS:

Q. Now, the informant is a person who is an officer, or in this particular case isn't the informant a user, somebody who is just on the street that makes buys?

A. In this particular case the informant is a civilian. And they're on the streets making buys for police officers.

Q. Isn't it true that an informant is someone who you make a deal with not to prosecute if they will help you trap other people?

A. Not in all cases. This particular informant, to my knowledge, has never been involved in a court case. How they were registered I don't know.

Q. But this is someone who is a person who uses drugs for sale; isn't that correct?

A. No, that's not correct.

Q. That's not correct?

A. No.

Q. This person is a civilian who is just somebody who you can get to go buy drugs and turn them over to the police department?

A. If I can get that person to go get -- buy drugs and turn the drugs over to the police department, yes.

Q. And you pay this informant to do that; is that correct?

A. That's correct.

Q. Was that the case in this situation?

A. That I paid him after he made this particular purchase?

Q. That he was paid to do this job?

A. Yes.

Q. Because his identity, or her identity, is not known, is it possible for this informant to do this often enough to make a small living? It is possible?

A. It is possible, yes.

Q. In this particular case how do you know that this person is not a drug user, this informant?

A. Well, I've used this informant several times and I've never seen this informant under the influence. Most drug users when we see them they have swollen hands from using needles and things. And this informant doesn't have swollen hands. So, I can just assume that this informant is not a drug user.

Q. I see. So, just for the sake of having this person work for you he just does his job and as far as you know he turns over all of the drugs that he --

A. Not as far as I know. I'm positive because I search any informant I use before they go there and make sure they have no drugs or no money on them whatsoever. Then I give them the money that I want them to use. Then after they bring back whatever they purchase I search them again to make sure that they didn't keep any drugs or make sure that they didn't keep any drugs or make sure they didn't keep any money so I know the exact price of the drugs.

Q. Was this the person who the informer bought the cocaine from arrested?

A. No, they weren't. The person he bought the cocaine from was not arrested.

Q. So, you've got a buyer and a seller and neither one are arrested. It just leads you to Miss Wilcox?

A. The person the informant bought the cocaine from was Tim. He would have been arrested if he would have been there at the house, but he wasn't there. And I didn't know where to go and get him at so he was not arrested.

THE COURT: You mean you didn't know how to go and find him?

THE WITNESS: No.

THE COURT: You couldn't have found him in the City of Detroit?

THE WITNESS: Not with just the first name of Tim and a description unless we sat on that house forever how long and he showed up back again.

BY MR. BASS:

Q. At the time that drugs were sold by Tim was this setup for this buy -- was this a setup buy?

A. At the time?

Q. That the informant bought the drugs from Tim?

A. Yes. He was searched like I just explained.

Q. No, no not the informant. Did you setup the informant to buy the drugs from Tim?

A. No. I setup the informant to buy

drugs from that house or from whomever was in the house.

Q. I see. And it was your understanding that they were bought from this house?

A. It's not my understanding. I saw him go to that house and return directly to me.

Q. And it took you a week to get a search warrant to go back to the house?

A. No. We had other raids in between that time. And it was just this particular day that we went to that house. We do search warrants on a daily basis. We take the priority of the search warrants to make it two a day. And whichever one is the most priority is the one we do. But eventually all of them are executed.

Q. Officer, here you have a fresh sale of cocaine.

A. On that day I might have had three fresh sales of cocaine.

Q. Well, you might have had 10. But you still had a fresh sale and it took a week to ask for a search warrant; is that correct?

A. It took me a week before we executed the search warrant.

THE COURT: Now, the day that the informant bought the cocaine from this fellow Tim were you near the premises or was some other officers near?

THE WITNESS: Yes, I was near the premises.

THE COURT: You were near?

THE WITNESS: Yes.

THE COURT: You were working with the informant?

THE WITNESS: Yes.

THE COURT: And he brought you the cocaine back?

THE WITNESS: Yes.

THE COURT: What did you do with that cocaine?

THE WITNESS: Took it to the Narcotic Section and placed it not a lock sealed folder for lab analysis.

THE COURT: Well, why didn't you go right in and arrest Tim?

THE WITNESS: I didn't have a search warrant for the house right then.

THE COURT: Well, you didn't need a search warrant did you? Your informant went in and brought you the cocaine didn't he? Would you need a search warrant to go in and arrest him?

THE WITNESS: Yes. That's somebody's house. I don't have the right just to go in somebody's house without a search warrant.

THE COURT: Now, if you're in hot pursuit of somebody you don't have a right to go in?

THE WITNESS: If I'm in hot pursuit. But, if they're already inside the house that's not pursuit.

THE COURT: Oh, it's not?

THE WITNESS: No.

MR. BASS: I just want to finish with these few questions.

BY MR. BASS:

Q. It's your understanding that when you witness a drug sale that you cannot arrest the person who made the sale unless you have a warrant?

A. No, that's not what I'm saying. If they're inside a private residence I need a search warrant to go back in that residence to make it legal for me to be inside. You just can't kick in a door because somebody is there and you know that they're there.

Q. If you know that a drug sale has just taken place for hard drugs and you have somebody who you gave money to setup a drug buy, do you want the Court to believe that you don't feel that you have the authority to go directly back into that house and arrest the people in that house, and look for the person who made that sale, and look for those drugs?

A. I want him to believe it because it is true. We do not have that right.

THE COURT: Let's take another example. Suppose you send an informant in and he makes a buy. And while he's in there the seller kills somebody in there. And he brings the drugs back to you and tells you not only did he sell me these drugs, he killed a man. Would you have a right to go in there or would you have to go downtown and tell a judge, and let this man go on

to the airport and go to Costa Rica or somewhere?

THE WITNESS: In that instance I think I can go in because I'd be going in there to save somebody's life.

THE COURT: No, he's already shot somebody.

THE WITNESS: Right. So, somebody telling me that somebody shot somebody I would go in. They could be alive. So, I'd be either saving somebody's life.

THE COURT: But that makes a difference?

THE WITNESS: Yes, I think it does.

THE COURT: You can go in under those circumstances?

THE WITNESS: Yes.

THE COURT: Did somebody tell you that in the training that you took to be a police officer?

THE WITNESS: About search warrants?

THE COURT: That you couldn't go in there and arrest somebody after they had sold drugs?

THE WITNESS: Not only training but in this court.

THE COURT: Who told you that?

THE WITNESS: I can name a couple of cases that I've been in that we use to do B & Bs like that and they were dismissed because we

didn't have the right. The last one I had was with Vera Massey Jones. Maybe a year ago.

THE COURT: You went right back in?

THE WITNESS: I made the buy myself.

THE COURT: Went right back in?

THE WITNESS: Within five minutes later. And she dismissed the case.

THE COURT: And she told you didn't have a right to do that?

THE WITNESS: Yes. That's my personal experience with Vera Massey Jones.

BY MR. BASS:

Q. Officer, if you witness a felony in progress do you have the right as a police officer to arrest the offending party?

A. If I witnessed a felony, yes.

Q. If you know that a felony is taking place do you have a right as a police officer to arrest the offending party?

A. If I -- yes. If I have knowledge of a felony.

Q. So, then if you have a source setup to buy narcotics and the narcotics transaction does in fact take place, and the source brings you back the narcotics, can I assume that you know that a felony has taken place since you searched the subject before he goes in and you know that

he didn't have this before he went in?

A. I knew a felony has taken place but we go back to the person's right to privacy. And that's when the search warrant comes in again.

Q. Does the right to privacy include the right to commit a crime?

A. No. There's the amendments to the privacy where a search warrant is needed.

THE COURT: Now, let's don't get search warrants and arrest warrants mixed up. They are different aren't they?

THE WITNESS: Yes.

THE COURT: You still wouldn't have the right to go in and arrest that man, not to search now, to arrest him? Your informant, who you put a lot of stock in, you say that you work with this man a lot; right?

THE WITNESS: Right.

THE COURT: And you trusted him?

THE WITNESS: Okay.

THE COURT: So, he comes out and says I made the buy and the man is in the house right now. You wouldn't have the right to go in there and arrest him?

THE WITNESS: To arrest him, yes, but to search for and confiscate any other drugs, no.

THE COURT: But I didn't ask you about a search. You kept saying about search. Why didn't you go in there arrest him?

THE WITNESS: Because we choose to get a search warrant so we can confiscate all the drugs in the house.

THE COURT: So, you just took the law in your hands, I won't arrest him, I want to search?

THE WITNESS: No. That's just the policy of the Narcotics Section.

THE COURT: That's what I said, the Narcotics Section set the policy?

THE WITNESS: Yes.

THE COURT: Pushed the law aside, we're not going to abide by the law. We choose to do this our way. We have a better idea. Is that the way you run it?

THE WITNESS: No, that's not the way I run it.

THE COURT: Well, how do you run it then?

THE WITNESS: They choose to confiscate all the drugs on the premises so they get a search warrant.

THE COURT: All right. Let me ask you this. If you had gone in there and arrested that man would you have had a right to search without a search warrant?

THE WITNESS: No, not at all.

THE COURT: After making a lawful arrest you wouldn't have a right to search?

THE WITNESS: No way whatsoever.

THE COURT: All right. Would you have had a right to go into there and arrest him and stay there until some other officer goes and gets a search warrant?

THE WITNESS: That would have been possible.

THE COURT: But you didn't even do that?

THE WITNESS: No, we didn't.

THE COURT: Well, that's what I said, so you just took the law in your hands. You decided how you were going to do that through the policy of the Narcotic Squad. They make the policy?

THE WITNESS: That's correct. Them and the courts. I mean, they abide by what the courts decide.

THE COURT: But the court is not out there. The court is down here.

THE WITNESS: But we have guidelines to go by. We have to follow those guidelines.

THE COURT: All right. And the police department makes the guidelines. So, they supercede the law. Is that right?

THE WITNESS: No, they don't supercede the law.

THE COURT: Well, what are you telling me then? Why don't you follow the law instead of the guidelines?

THE WITNESS: The law is the guidelines.

THE COURT: Say what?

THE WITNESS: The law are the guidelines that we follow.

THE COURT: I thought the Legislature made the law. Are you telling me the police department makes the laws?

THE WITNESS: No. I said the law --

THE COURT: You told me the guidelines are the law. Didn't you just say that?

THE WITNESS: Yes.

THE COURT: Well, who makes the guidelines?

THE WITNESS: The Legislature, courts, police department.

THE COURT: Oh, you finally got that in there. The police department makes the law?

THE WITNESS: No. They make some of the guidelines that I have to follow that are according to the laws. I mean, the laws --

THE COURT: But are guidelines the laws?

THE WITNESS: That's what I'm saying, your Honor.

THE COURT: Well, I'm asking you that question.

THE WITNESS: There are laws that I have to follow.

THE COURT: Yeah.

THE WITNESS: There are guidelines that do not supercede the law that I also have to follow.

THE COURT: All right.

BY MR. BASS:

Q. Officer Terry, in this particular case is it more efficient for the police department to determine that there's some kind of suspected narcotics, then lay in wait, then charge in when they feel like they're about ready to go in, or is the policy of the police department to stop the felony, or to stop the felonious activity as soon as they get wind of it?

A. Are we talking about narcotics right now?

Q. Yes, sir.

A. Well, it's not charging when we get ready, but it is the policy of the police department whenever possible to get a search warrant.

Q. So, it makes it more efficient to search than to arrest even though a felony has occurred under your nose, and you put it off and you go back later and just do anything you want to?

A. In this particular incidence if I would have arrested Tim I could not testify against Tim whatsoever. The source would to have had to testify. That would have been another person who was the complainant and not myself.

THE COURT: And that would have been the informant?

THE WITNESS: That's correct.

THE COURT: You could have testified. You could say I was out there.

THE WITNESS: I was outside and saw somebody go in the house.

THE COURT: No, no. Not somebody, some informant go in there. That's almost like saying I went in there. Isn't it?

THE WITNESS: That's correct. But what would have been the charge? The person that was arrested would be testifying saying I saw an informant go in the house and then come back out and show me some cocaine. And then go in and arrest somebody, what could that person have been charged with?

THE COURT: Selling cocaine.

THE WITNESS: Who is going to be the complainant against that person?

THE COURT: Your informant.

THE WITNESS: Then my informant is no good no more.

THE COURT: So what? See, I'm almost at the point now of making you bring the informant in here. I have the authority to do it.

THE WITNESS: I understand that, your Honor.

THE COURT: Well, now don't get too smart. Let's take a brief recess. Step into the juryroom, Members of the Jury.

(Jury excused at 3:10 P.M.)

(Court in recess at 3:10 P.M.)

(Jury returned at 3:20 P.M.)

THE COURT: All right. Court is in session. (Witness Keith Terry resumed stand.)

THE COURT: I've talked with the Chief Appellate Lawyer. And I couldn't remember coming across this question. He tells me that as far as he's concerned there is no case in Michigan on this point. I think we all agree that you could not go in there and search, but there is a question of whether or not you could go in and arrest. And my feeling is that under these circumstances an officer should have the right to go in that home immediately and arrest a person who is selling drugs. Now that's my feeling.

And you've told me that Judge Jones dismissed your case?

THE WITNESS: That's correct.

THE COURT: All right. I'm going to dismiss this one.

MR. REUTHER: Your Honor, I haven't had the opportunity to ask this officer some questions. I think that I can --

THE COURT: No, I want that question settled. I think the police should have that right.

MR. REUTHER: But there's a practical reason why this officer did not do that. And I would like to make an offer.

THE COURT: What is the practical reason?

MR. REUTHER: The practical reason is that Sergeant McCann here -- he was working under Sergeant McCann. He went out to that location alone with an informant. The informant made a buy in front of him.

THE COURT: In front of who, this officer?

MR. REUTHER: In front of this officer. He was alone. He could not go in the house alone and arrest anyone. He had no cover. He had no protection.

THE COURT: No, that isn't the point. The point is I think, under this case, I think that officer should have a legal right to go in that house. And what better case to settle it by than this one? Suppose this was a big case.

MR. REUTHER: But we're talking about the buy and the search warrant.

THE COURT: That's right. I'm talking about he should have the right to go in that house and make the arrest.

MR. REUTHER: Well, I agree that he has the right to go in the house, but it's impractical that he would go in the house.

THE COURT: I'm not talking -- see, every time we start talking about the law everybody tries to tell me about the -- everything but the law. I'm interested in the law. Now, if we wait around the we get a great big case, and the officer goes in, and the law is then established that he shouldn't have gone in, you loose your big case don't you? Don't you?

MR. REUTHER: Well, I kind of agree with you.

THE COURT: Well, why wait for the big one. Let's do it with the little one and establish the law.

MR. REUTHER: Well, I just don't see how --

THE COURT: Now, the Federal Government has said he has the right to go in. There is one Federal case that I know of which gives him the right to go in there under these circumstances, but no State case.

MR. REUTHER: But he was directed by Officer McCann --

THE COURT: All right. Now, I told you what I'm going to do. You can stand up there and turn as black as I am and I'm going to do it. Now, do you want to do that? Do you want to waste time?

MR. REUTHER: No, I don't.

THE COURT: Well, sit down and let me do what I'm going to do.

MR. REUTHER: I don't want to offend the Court at all.

THE COURT: You're not offending me. I've talked to Mr. Baughman. He assures me he's going to appeal. Now, what more do you want? Let's get the law straightened out.

MR. REUTHER: Okay.

THE COURT: See, this officer sat here and tells me what the police department guidelines are. I don't care about the police guidelines. That's the police department. I'm talking about the law. I'm trying to protect these officers.

If he cant' see it too bad. If you want to get mad about it, Officer, get mad.

THE WITNESS: I'm not mad, your Honor.

THE COURT: Well, the way your

looking at me. I'm trying to protect you, and give you more rights than you have. And I think I ought to do that. I think I ought to give a defendant more rights than he has if it's legal. See. Like I said, suppose we wait around and guy has got a ton of cocaine in a house, and you send an informer in there, he brings you some out, but you can't go in there and arrest him. I think the law ought to be you can go in there and arrest that guy. Common sense tells me that. You've got probable cause. The question has never gone before our appellate courts. Let's get it up there. See. Before the big one comes. Then you'll know what to do when the big one comes. Don't go in there and mess it up. That's all I want to do. I want to protect you under these circumstances.

THE WITNESS: May I ask the Court one question?

THE COURT: Yes.

THE WITNESS: The circumstances your's explaining are different than this one. It was a search warrant involved. So, how would than change the idea of not having a search warrant, where there's a search warrant?

THE COURT: But you didn't go in there. And on the record you told me why you didn't go in there. See, it's on the record why you didn't go in.

THE WITNESS: Okay.

THE COURT: As I told you when you were on the stand, I think you're a sharp officer myself. I

still do. You've got some real sharp policemen in that police department over there. But, I want to protect you if I can. And to me maybe this is a violation of law, maybe. But it's about marihuana, you see. And if it is a violation the Court of Appeals is going to reverse me. They're going to send the case back and reinstate it. So, we haven't lost anything. But, if we get them to adjudicate it and say yes you're right, that police officer had a right to go in there, look how far in advance you would be. You wouldn't have to run back downtown to get a search warrant. You have probable cause. I think all of us agree to that, you've got probable cause. You've worked with this informant. You found him to be reliable. You watched him go in. You gave him the money. He brings you the dope out. Why shouldn't you have a right to go in there and arrest? Under these circumstances I think that you had a right to go in there. Well, let's find out. And if you loose the case what have you lost with this one? Nothing.

OFFICER MC CANN: Nothing. You're right.

THE COURT: But I think you're going to win. I think they are going to reverse me and say the man had a right to go in there.
So let's bring that Jury out.

MR. BASS: Before the Jury comes out I have a question as well. Where is that going to put the defendant's position if they answer that question? I think as far as whether or not the search warrant -- I guess one of the questions was whether or no -- was whether or not

the sufficiency of the police operation violated the defendant's right to search and seizure.

THE COURT: Well, you can bring all that up.

MR. BASS: Okay. Well, but we're talking about jeopardy because --

THE COURT: No, this wouldn't be jeopardy. The prosecutor has the right now to appeal. And thank God he has. At one time he wouldn't have the right to appeal. But, he does have the right to appeal now and reinstate that case if I'm wrong.

MR. BASS: About the question of whether or not --

THE COURT: The officer had a right to go in that house.

MR. BASS: I'm in agreement, of course, with the Court's dismissing this case, but from the viewpoint of the rights of this defendant how -- what kin of bearing is that?

THE COURT: Well, see, I can't say what right the Court of Appeals is going to have. I don't know. What I want resolved is a question of law, a very important question of law.

MR. BASS: I think it is.

THE COURT: Whether that officer had a right to go in under those circumstances.
You have protected the record.

MR. BASS: I though that the case, the case law was clear. It's

not an assumption where if a drug deal is setup and made, even though the officer who is the instigating force, if you will, knows that it's being made, and they're brought back to him. If he does not have -- he doesn't have to see the drug deal directly. He doesn't have to see the money change for the substance. If he gets substance back he knows that a felony has been committed.

THE COURT: Well, if they appeal you throw that in the appeal. You bring it up.

MR. BASS: Well, I'm bringing it up now too for the record.

THE COURT: Well, I can't answer that question.

MR. BASS: Okay.

THE COURT: Bring them out.

(Jury returned at 3:33 P.M.)

THE COURT: All right. Will both sides stipulate that the Jury is properly seated?

MR. REUTHER: Yes, your Honor.

MR. BASS: Yes, your Honor.

THE COURT: All right. Members of the Jury, I think this case is over. And I'm not going to just say it's over and send you home. It's a technical question of the law that I want you to try to understand here. You heard me ask the officer several questions, why not, why didn't you go in there. This officer is one of the, I wouldn't say most intelligent officer in the police department, but he certainly is no dummy. I'll

classify him, as I said, he's one of the more intelligent officers that I've come in contact with. He's sharp. He was so sharp until I would not make a decision until I had had a chance to go back in my office and read the law and talk to people in the Prosecutor's Office in the Appeals Division.

And I have come up with this. This question has never been adjudicated, as I can see it, in the State of Michigan, of whether or not that officer had a legal right to go in that house and arrest Tim at that time. That has never been answered in the State Supreme Court. It has been answered in our courts, right here in this court. I think that that officer had a right to go right into there and arrest that man. I think that. I don't know what the State Supreme Court is going to say, but our United States Supreme Court has said that he does have a right to go in right then and there. He doesn't have to run back down here and find a judge, because like I said, the man could go out to the airport and buy a ticket to Costa Rica. And if he'd land there we could never get him out of Costa Rica. So sometimes you have to use common sense, come out of the book sometimes. And that's what I'm proceeding on, common sense. I think he had enough legally to go in that house and make that arrest.

I'm going to stop the case at this point. That does not mean that this lady walks out of this court free.

Do you understand what I'm saying?

The prosecutor has a right to appeal my decision. And that's what he's going to do. I think this ought to be cleared up.

Are you following me or am I over your head or what?

I think the State Supreme Court ought to say, Judge Heading, you are wrong or you are right. And this problem would be settled.

There are too many, in my opinion, legal technicalities that, now, let me be careful in what I'm going to say, in times like they are now to stop these dope people. The scale has tilted. They've got the advantage. Now, I wouldn't have said this, say, two years ago. But, I'll say it today. They've got the advantage. If that officer didn't have the right to go in that house at that time he's never going to have that right. And a man can stay in his house and sell all the dope he wants to sell hollering my right of privacy. I don't think that applies here. I don't think it does. But we're going to find out. And I hope you understand what I'm trying to do, clear it up so everybody will know what a police officer's right, his rights are. Just like the defendant's rights. They have rights. Why shouldn't the police have rights within bounds. Just don't urn them loose. Just don't tell them, now, you've got the right to go in their house if you want to. That's not what I'm saying. But when he knows or he firmly believes that a crime has been committed in a house, I think he ought to have the right to go in there and investigate and arrest the person who has committed that crime.

Are you with me?

That's the only way we can combat these situations. If that isn't going to be the law then may the good Lord have mercy on us.

You know what's going on. You read it. Like that gentleman on the

back said, he said he's been mugged, his house has been broken into, his car stolen. That's happening everywhere. I told you about Grosse Pointe. They don't put that on the air what's going on our there. They put it on the air what's going on in Detroit.

But now I have tried 10 cases myself, big cases, coming out of the Grosse Pointe. And I didn't know that because I didn't have the jurisdiction to try their cases. But since they gave us the jurisdiction 10 cases have come right in here before me. I don't know how many has come before the other judges. But I have counted them. Not 10 little ones, 10 big ones, when you're talking about kilos.

So, I'm going to try to straighten this thing out. The police has got to have something to battle with. They can't go out there fighting a lion with a switch. They'll loose every time. The lion will eat them up. If this guys got a machine gun, give that police officer a machine gun. If he's got a Gatling gun, give that police officer a Gatling gun. Make it even. If you don't do that I cant' see the end of the tunnel.

I like to explain to people what I'm doing. I don't like for you to go out and say, now, he did something and he didn't explain to us what he was doing. I want you to be able to explain what happened in this courtroom, right or wrong. Like I said, I might be right, I might be wrong. I don't care if they reverse me. Let's clear up the law. You see some judges will sit up and use fifty dollar words. Nobody knows what he's talking about except that judge. Well, I don't

know any fifty dollar words. I know a lot of nickel and dime words. And that's what I use, so people will understand after they come in here and go back out. At least to understand what I'm saying. You might not agree with me, but that's your business. That's what we're doing. If the Supreme Court reverses me fine. But at least I'll know what the law is. Right now I don't know. I know what the United State Supreme Court has said. They said yes, he has a right to go in there. And I'm with them at this point. And I believe the State Supreme Court is going to go along. That's where we are.

Now don't feel like you've wasted time. If you hadn't come somebody else would have had to come. She's entitle to a trial. If I get in trouble I want a trial. I wouldn't want the police to arrest me, prosecute me, and then be the judge too. No. And I'm sure you'd want that too. So, you have not wasted time. In fact, I think that you've learned something. Maybe you haven't. But, I hope you have. Something that you can carry back out of this courtroom and say I learned something while I was down there. I didn't waste my time.

So, with that in mind you are free to go home. You're free to talk about this case to anybody you want to. Leave our badges. And all of you have a Merry Christmas and a Happy New Year.

All right. Thank you.

(Jury excused at 3:45 P.M.)

(Court in recess at 3:45 P.M.)